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Federalism: Selected Opinions of Judge Samuel Alito

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Summary

During his 15 years as a federal appellate judge on the Third Circuit, Judge Samuel Alito has written several opinions related to federalism. Two of these cases appear to be of particular significance. In *Chittister v. Department of Community and Economic Development*, Judge Alito authored a unanimous opinion which held that an individual could not sue a state under the Family Medical Leave Act (FMLA). This opinion addressed an issue which has been controversial in recent years — the parameters of the 11th Amendment and Section 5 of the 14th Amendment. The decision held that a provision of the Family Medical Leave Act which mandates the provision of sick leave for employees with serious health conditions could not be enforced by employees against states agencies or instrumentalities.

In *United States v. Rybar*, Judge Alito authored a dissent to a decision that upheld a law providing that "it shall be unlawful for any person to transfer or possess a machine gun" as within the authority of the Congress under the Commerce Clause. Judge Alito, noting that the statute lacked both a requirement for a specific connection to interstate commerce and findings that the purely intrastate possession of machine guns had a substantial effect on interstate commerce, would have struck the law down.

In general, it appears that Judge Alito's opinion in the *Chittister* case was consistent with Supreme Court precedent at the time. Although Judge Alito has been criticized because his opinion did not anticipate the result in the subsequent case of *Nevada Department of Human Resources v. Hibbs*, the *Hibbs* case actually addressed a separate provision of the FMLA. The *Chittister* case is arguably distinguishable from the *Hibbs* case, a conclusion which has been reached by other federal circuits.

Judge Alito's dissent in the *Rybar* case, however, seems to have anticipated a more expansive application of the Supreme Court decisions in *Lopez* and *Morrison* than was being utilized by most other circuits at the time. Further, his reasoning in *Rybar* may have been repudiated by the Supreme Court in *Gonzales v. Raich*. Consequently, it would appear that Judge Alito's dissent was an argument for a more limited interpretation of the Commerce Clause than is consistent with current case law.

Contents

Federalism: Selected Opinions of Judge Samuel Alito

During his 15 years as a federal appellate judge on the Third Circuit, Judge Samuel Alito has written several opinions related to federalism.[1] Two these cases appear to be of particular significance. In *Chittister v. Department of Community and Economic Development*,[2] Judge Alito authored a unanimous opinion which held that an individual could not sue a state under the Family Medical Leave Act (FMLA).[3] This opinion addressed an issue which has been controversial in recent years — the parameters of the 11th Amendment and section 5 of the 14th Amendment. The decision held that a provision of the Family Medical Leave Act which mandates the provision of sick leave for employees with serious health conditions could not be enforced by employees against state employers.

In *United States v. Rybar*,[4] Judge Alito authored a dissent which considered whether a law providing that "it shall be unlawful for any person to transfer or possess a machine gun" was outside of the authority of the Congress under the Commerce Clause. Judge Alito, noting that the statute lacked both a requirement for a specific connection to interstate commerce and findings that the purely intrastate possession of machine guns had a substantial effect on interstate commerce, would have struck the law down.

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[1] See Chittister v. Department of Community and Economic Development, 226 F.3d 243 (3rd Cir. 2003)(holding that a state is immune from suit under the Family Medical Leave Act regarding personal sick leave); Hechinger Investment Company of Delaware v. Hechinger Liquidation Trust, 335 F.3d 223 (3rd Cir. 2003)(holding that 11th Amendment issues, although jurisdictional, did not have to be decided before a court could reach the merits of a case); Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807 (3d Cir. 1991) (holding that the Pennsylvania Transportation Authority is not an alter ego of the state, and thus cannot claim 11th Amendment immunity); United States v. Rybar, 226 F.3d 223 (3rd Cir. 2003)(Alito, J., dissenting)(opinion arguing that criminal prohibition on possession of machine guns was outside of the Congress's commerce clause powers); United States v. Wright, 363 F.3rd 237 (3rd Cir. 2004)(defendant need not be aware of connection of activity to interstate commerce to be charged with crime).

[2] 226 F.3d 223 (3rd Cir. 2003).

[3] 29 U.S.C. §§ 2601-54.

[4] 103 F.3d 273, 274 (3rd Cir. 1996).

Sovereign Immunity and the 14th Amendment

Background

When an individual attempts to sue a state under federal law, an argument can be raised by the state that it is immune to such a suit under the doctrine of sovereign immunity. The starting point for such a discussion is usually the Eleventh Amendment, which provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." The actual text of the Amendment appears to be limited to preventing citizens from bringing diversity cases against states in federal courts. However, the Supreme Court has expanded the concept of state sovereign immunity to reach much further than the text of the Amendment.

The Eleventh Amendment was passed as a response to the case of *Chisholm v. Georgia*,[5] which allowed a private citizen of one state to sue another state in federal court without that state's consent.[6] Almost immediately after the decision in *Chisholm*, resolutions were introduced in Congress to overturn it, the end result being the Eleventh Amendment.[7] The Amendment assured that a citizen of one state could not sue another state in federal court — in other words, a citizen could not sue under federal diversity jurisdiction without a state's permission.

In *Hans v. Louisiana*, the Court provided for an even more expansive interpretation of the Eleventh Amendment[8] which banned suits by citizens against states regardless of whether or not the citizen was a resident of another state.[9] Later

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[5] 2 Dall. 419 (1793).

[6] Immediately after the adoption of the Constitution, a number of citizens filed cases in federal court against states. One of these, *Chisholm*, was a diversity suit filed by two citizens of South Carolina against the State of Georgia to recover a Revolutionary War debt. In *Chisholm*, the Supreme Court noted that Article III of the Constitution specifically grants the federal courts diversity jurisdiction over suits "between a State and citizens of another State." U.S. Const., Art. III, §2. Thus, the Court held that this grant of jurisdiction authorized the private citizen of one state to sue another state in federal court without that state's consent.

[7] The states were upset such a suit could be brought in federal court, protesting that the drafters of the Constitution had promised the states they would not be sued by their creditors in federal courts. Alden v. Maine, 527 U.S. 706, 720 (1999).

[8] After the Eleventh Amendment was passed, a number of cases were filed against states by their own citizens, with jurisdiction based on federal question jurisdiction rather than diversity. Under this reasoning, if a citizen of a state sued his or her own state in federal court, the prohibition of the Eleventh Amendment would not apply. Consequently, for a number of years after the passage of the Eleventh Amendment, this type of case was entertained by the federal courts. However, this line of cases was ended by the case of Hans v. Louisiana, 134 U.S. 1 (1890).

[9] Ultimately, the issue before the Court in Hans v. Louisiana and in subsequent cases was

(continued...)

cases established that Congress could not generally abrogate this immunity under its Article I legislative powers.[10] The Supreme Court has held, however, that Congress can abrogate state sovereignty under the §5 of the Fourteenth Amendment, which authorized Congress to pass laws to enforce the protections of that Amendment.[11] While the logic behind this distinction is unclear,[12] it means that in many cases litigants suing states will have to find a Fourteenth Amendment basis for federal legislation in order to defeat an Eleventh Amendment defense.

Recent Supreme Court cases, however, make it more difficult for a court to find that the Fourteenth Amendment is the constitutional basis for legislation. In the case of *Flores v. City of Boerne*,[13] the Court struck down the Religious Freedom Restoration Act (RFRA) as beyond the authority of Congress under §5 of the Fourteenth Amendment. The case arose when the City of Boerne denied a church a building permit to expand, because the church was in a designated historical district.

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[9] (...continued)
not the Eleventh Amendment, but the issue of state sovereign immunity. State sovereign immunity means that a state must consent to be sued in its own court system. This concept is based on early English law, which provided that the Crown could not be sued in English courts without its consent. The doctrine of sovereign immunity was in effect in the states which were in existence at the time of the drafting of the Constitution. Further, various writings by the founding fathers seemed to support the concept. See Alden v. Maine, 527 U.S. 706, 716-17 (1999). Thus, the issue before the Court in *Hans* was whether the grant of jurisdiction to federal courts under Article III of the Constitution had abrogated state sovereign immunity. The *Hans* Court found that Article III did not have this effect.

[10] See, e.g., Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). In *Seminole Tribe*, the Court evaluated the Indian Gaming Regulatory Act of 1988, which provided Indian tribes with an opportunity to establish gambling operations. The Court determined that the law was passed as an exercise of the Article I power over Indian commerce, U.S. Const., Art. I, cl. 3. Noting that the Eleventh Amendment was ratified after the passage of the Constitution and Article I, the Court held that the Eleventh Amendment limited Congress's authority to waive a state's sovereign immunity under that Article.

[11] Fitzpatrick v. Bitzer, 427 U.S. 445, 452-53 (1976).

[12] One apparent argument is that the Fourteenth Amendment was passed after the Eleventh Amendment and thus, unlike Article I, it can be seen as an alteration of the restrictions of the Eleventh Amendment. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 65-66 (1996). However, as noted above, state sovereign immunity preceded and predated the Constitution. Consequently, all the Articles of the Constitution could arguably be seen as altering the restrictions of state sovereign immunity.

Another argument made by the Court in *Seminole* is that the Fourteenth Amendment was designed to alter the pre-existing balance between state and federal power at the time of its passage. This argument is more plausible, but is still difficult to differentiate between Congress's power under the Fourteenth Amendment and Congress's power under the Articles of the Constitution. Like the Fourteenth Amendment, the Articles of the Constitution were clearly intended to alter the balance between state and federal power at the time of the passage of the Constitution, including state sovereign immunity. This is exemplified by the Supremacy Clause, U.S. Const., Art. VI, cl. 2, which provides that laws passed under the Constitution would be supreme over state law.

[13] 521 U.S. 507 (1997).

The church challenged the zoning decision under RFRA. The Supreme Court reiterated that §5 of the Fourteenth Amendment gave the Congress the power to enforce existing constitutional protections, but found that this did not automatically include the power to pass any legislation to protect these rights. Instead, the Court held that there must be a "congruence and proportionality" between the injury to be remedied and the law adopted to that end.[14]

Based on the *City of Boerne* test, the Court has struck down a variety of laws which were designed to deal with the issue of discrimination. For instance, in *Kimel v. Florida Board of Regents*,[15] the Court evaluated whether the Age Discrimination in Employment Act of 1967 was a valid exercise of Congress's commerce power and §5 power, and thus could be applied against the states. The *Kimel* Court held, however, that age is not a suspect class, and that the provisions of the ADEA far surpassed the kind of protections that would be afforded such a class under the Fourteenth Amendment.

Further, the Court found, based on *City of Boerne*, that an analysis of the Congress's ability to legislate prophylactically under section §5 required an examination of the legislative record to determine whether the remedies provided were proportional and congruent to the problem. A review by the Court of the ADEA legislative record found no evidence of a pattern of state governments unconstitutionally discriminating against employees on the basis of age. Consequently, the Court held that a state could not be liable for damages under the ADEA.

The application of the Americans with Disabilities Act (ADA) to states was also considered in the case of the *Board of Trustees v. Garrett*,[16] with similar result. In *Garrett*, the Court evaluated whether two plaintiffs could bring claims for money damages against a state university for failing to make reasonable accommodations for their disabilities; one plaintiff was under treatment for cancer, the other for asthma and sleep apnea. Although disability is not a suspect class and thus discrimination is evaluated under a rational basis test, the Court had previously shown a heightened sensitivity to arbitrary discrimination against the disabled.[17] Further, Congress had made substantial findings regarding the pervasiveness of such discrimination.

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[14] For many years prior to the passage of RFRA, in order for a law of general applicability restricting the free exercise of religion to be consistent with the Freedom of Exercise Clause of the First Amendment, it had to be justified by a compelling governmental interest. However, in the 1990 case of Oregon v. Smith, the Court lowered this standard. The *Smith* case involved members of the Native American Church who were denied unemployment benefits when they lost their jobs for having used peyote during a religious ceremony. The *Smith* case held that a neutral, generally applicable law may be applied to religious practices even if the law is not supported by a compelling governmental interest. RFRA was an attempt by the Congress to overturn the *Smith* case and to require a compelling governmental interest when a state applied a generally applicable law to religion.

[15] 528 U.S. 62 (2000).

[16] 531 U.S. 356 (2001).

[17] Cleburne v. Cleburne Living Center, Inc. 473 U.S. 432 (1985).

However, the Supreme Court declined to consider evidence of discrimination by either the private sector or local government, and dismissed the examples that did relate to the states as unlikely to rise to the level of constitutionally "irrational" discrimination. Ultimately, the Court found that no pattern of unconstitutional state discrimination against the disabled had been established, and that the application of the ADA was not a proportionate response to any pattern of discrimination that might exist.

As noted, *Kimel* and *Garrett* involved the evaluation of congressional statutes addressing discrimination against non-suspect classes. When the class which is the focus of legislation has a higher level of constitutional protection, however, the Court has seemed to use a more lenient standard. In the case of *Nevada Department of Human Resources v. Hibbs*,[18] an employee of the Nevada Department of Human Resources had a dispute with the Department regarding how much leave time he had available under the FMLA. The FMLA requires, among other things, that employers provide employees up to twelve weeks of unpaid leave to care for a close relative with a "serious health condition."[19]

In *Hibbs*, the Court held that Congress had the power to abrogate a state's Eleventh Amendment immunity under the FMLA, so that a state employee could recover money damages. The Court found that Congress had established significant evidence of a long and extensive history of sex discrimination with respect to the administration of leave benefits by the states, and that history was sufficient to justify the enactment of the legislation under §5. The standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than the rational-basis test, which was at issue in *Kimel* and *Garrett*, so it was easier for Congress to show a pattern of state constitutional violations.

Chittister v. Dept. of Community and Economic Development

Judge Alito wrote the opinion for a unanimous court in the case of *Chittister v. Department of Community and Economic Development*,[20] which also considered if Congress had validly abrogated states' Eleventh Amendment immunity when it enacted the Family and Medical Leave Act of 1993.[21] However, unlike the later-decided *Hibbs* case, which considered the provision of leave to care for family members, *Chittister* concerned the provision of personal sick leave "because of a serious health condition that makes the employee unable to perform the functions of the position of such employee."[22] In a relatively brief opinion, Judge Alito found that Congress had not abrogated the state's sovereign immunity for causes of action cited by the plaintiff.

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[18] 538 U.S. 721 (2003).

[19] 29 U.S.C. § 2612(a)(1)(C).

[20] 226 F.3d 223 (3d Cir. 2000).

[21] 29 U.S.C. §§ 2601-54.

[22] 29 U.S.C. § 2612(a)(1)(D).

Although the *Chittister* case preceded the Court's opinion in *Hibbs*, some have suggested that the opinion should have anticipated the result in that case.[23] As noted, however, the opinion in *Chittister* dealt with a different provision of the Family Medical Leave Act. The Court in *Hibbs* did not decide the constitutionality of the personal sick leave provision considered in *Chittister*, and there are arguments to be made that distinguish these cases.

The Court's decision in *Hibbs* was based to a large extent on the congressional finding that "denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be."[24] Further, because employers assumed that women were primary caretakers, they would deny men leave for such purposes. Thus, both of these stereotypes tended to discourage the hiring of women,[25] and the requirement that employers provide family care leave would alleviate this disparity.

This reasoning, however, does not seem applicable to the case of personal sick leave. In *Chittister*, the Judge Alito noted that Congress's findings that the "the primary responsibility for family caretaking often falls on women" would be relevant for evaluation of the family care leave provisions. Judge Alito found, however, that there did not appear to be similar findings concerning the existence of intentional discrimination by employers against women in the provision of personal sick leave practices.[26] Nor did the court think that such practices would be likely to have a disparate impact on men and women. Even if such evidence existed, Judge Alito questioned whether the FMLA would be a congruent and proportional response, since it did not require nondiscriminatory sick leave practices, but merely created a minimum level of leave entitlement.

Chittister seems to be consistent with the decisions of other federal courts which considered this issue before *Hibbs* was decided.[27] For instance, in the case of

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[23] See, e.g., Bruce Ackerman, et. al., *Report of the Alito Project at the Yale Law School: The Alito Opinions* 6-7 (Dec. 19, 2005). This report noted that the Supreme Court had upheld provisions of the FMLA, and quoted the Supreme Court to the effect that "the State's record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation."

[24] *Hibbs*, 538 U.S. at 736 *quoting The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 99th Cong., 2d sess. 100 (1986).

[25] *Id.*

[26] 226 F.3d at 228-29.

[27] The Eighth Circuit held that entire Act was unconstitutional as applied to the states, Townsel v. Missouri, 233 F.3d 1094, 1095 (8th Cir. 2000), while the Fifth Circuit held that neither personal sick leave or family care sick leave provisions constitutionally abrogated state sovereign immunity. Kazmier v. Widmann, 225 F.3d 519, 526-27, 529 (5th Cir. 2000).

(continued...)

Kazmier v. Widmann,[28] the Fifth Circuit considered whether the personal leave provision of the FMLA could be applied against the states. The court first noted that Congress's express intent in enacting this provision was to prevent employers from discriminating on the basis of temporary disability,[29] not gender. The court did note suggestions in the legislative record that Congress also meant for this provision to prevent discrimination against women on the basis of pregnancy-related disability.[30] The Fifth Circuit, however, rejected an argument that the personal sick leave provision was intended to target sex discrimination.

First, the court noted that the FMLA contained a separate provision regarding maternity leave, which was arguably more closely related to concerns about pregnancy discrimination.[31] Second, the court noted that the Supreme Court has held that discrimination on the basis of pregnancy does not violate the Equal Protection Clause,[32] which would make it difficult to show that the provision was intended to remedy a pattern and history of unconstitutional gender discrimination. Finally, the court found that the effect of expressly mandating leave for pregnancy (among other serious health conditions) would not make employers more likely to hire women, but would actually make women less attractive employees.

Ultimately, the Fifth Circuit decided that the provision at issue was in fact directed solely at discrimination based on temporary disability. Unlike discrimination on the basis of sex, however, discrimination on the basis of disability is subject to minimal scrutiny under the Equal Protection Clause.[33] As such, the most relevant case decided at the time would appear to be the *Kimel* case, which evaluated an attempt by Congress to remedy discrimination based on age, which is another category with fewer constitutional protections. Relying on *Kimel*, the *Kazmier* court found that the FMLA "prohibits substantially more state employment decisions and

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[27] (...continued)
The First, Second, Fourth, and Eleventh Circuits reached the same conclusion considering the act's personal sick leave provisions. See Laro v. New Hampshire, 259 F.3d 1, 17 (1st Cir. 2001); Lizzi v. Alexander, 255 F.3d 128, 136 (4th Cir. 2001), *cert. denied*, 534 U.S. 1081 (2002), *reh'g denied*, 535 U.S. 952 (2002); Hale v. Mann, 219 F.3d 61, 69 (2d Cir. 2000); Garrett v. Univ. of Ala. Bd. of Trustees, 193 F.3d 1214, 1219 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001). The Ninth Circuit, while upholding the family care leave provisions, acknowledged that "we do not mean here to state any view with regard to the personal disability provision of the FMLA." Hibbs v. HDM Dep't of Human Res., 273 F.3d 844, 868 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003).

[28] 225 F.3d 519 (5th Cir. 2000).

[29] See H.R. Rep. No. 99-699, Part 2, at 25 (1986) ("[A] worker who has lost a job due to a serious health condition faces future discrimination in finding a job which has even more devastating consequences for the worker and his or her family.").

[30] 225 F.3d at 527.

[31] *Id.*

[32] Geduldig v. Aiello, 417 U.S. 484 (1974).

[33] States may discriminate on the basis of disability as long as the classification in question is rationally related to a legitimate state interest. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[34]

Even after the decision of the Supreme Court in *Hibbs*, federal courts seemed to follow reasoning similar to *Chittister* and *Kazmier*. The Sixth Circuit, in *Touvell v. Ohio Department of Mental Retardation & Developmental Disability*,[35] relied on the *Hibbs* case to reach essentially the same conclusion.[36] In fact, the Sixth Circuit specifically suggested that *Hibbs* did not undermine the reasoning of the various cases from other circuits that had reached this conclusion previously.

In *Touvell*, the Sixth Circuit made many of the same points as were made in *Kazmier* and *Chittister* regarding the legislative record for the FMLA. As in *Kazmier*, the gender discrimination of concern to the Congress related to the care of family members, and not to personal sick leave.[37] The Court in *Touvell* found no evidence of gender discrimination with regard to personal medical leave,[38] nor were the requirements for providing such leave seen as having any remedial or prophylactic effect on such discrimination. As with the previous cases, the Court found little evidence that gender discrimination was even at issue in the FMLA personal sick leave provisions.

Like *Kazmier*, the Sixth Circuit found that the sick leave provision was more likely intended to affect disability discrimination, and as such, it would be more difficult to establish a pattern and history of constitutional violation.[39] After considering the legislative record regarding disability discrimination and the nature of the legislation, the *Touvell* Court concluded that the FMLA personal sick leave provisions were not congruent and proportional responses to any alleged violations. As did *Chittister* and *Kazmier*, the Sixth Circuit concluded that the personal sick leave provisions could not be applied against the state under the Eleventh Amendment.

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[34] *Kazmier*, 225 F.3d at 524 *quoting Kimel*, 528 U.S. at 85. The court noted that the legislative record for the FMLA did not appear to reveal a pattern of unconstitutional discrimination by the states against the temporarily disabled. Further, the court questioned how mandated periods of leave would address unconstitutional discrimination, as it would not be unconstitutional for a state to offer no health-related leave at all. *Id.*, at 528.

[35] 422 F.3d 392 (6th Cir. 2005).

[36] See also Brockman v. Wyoming Department of Family Services, 342 F.3d 1159 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004).

[37] 422 F.3d 392, 400-401 (6th Cir. 2005)

[38] *Id.*, at 403.

[39] It should be noted that that the *Touvell* court was also able to consider the application of the case of *Garrett*, which had not been decided at the time of the *Kazmier* and *Chittister* cases.

The Commerce Clause

Background

The Commerce Clause provides that "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[40] Generally speaking, Congress's power under the Commerce Clause can be divided into three categories: (1) regulation of channels of commerce; (2) regulation of instrumentalities of commerce; and (3) regulation of economic activities which "affect" commerce.[41]

In the 1995 case, *United States v. Lopez*,[42] the Supreme Court brought into question the extent to which the Congress can rely on the Commerce Clause as a basis for federal jurisdiction. Under the Gun-Free School Zones Act of 1990, Congress made it a federal offense for "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[43] In *Lopez*, the Court held that, because the act neither regulated a commercial activity nor contained a requirement that the possession be connected to interstate commerce, the act exceeded the authority of Congress under the Commerce Clause. Although the Court did not explicitly overrule any previous rulings upholding federal statutes passed under the authority of the Commerce Clause, the decision appeared to suggest new limits to Congress's legislative authority. Subsequently, the lower federal courts were left to determine the precise scope of the limits imposed by the Court in *Lopez* as applied to other federal statutes.

United States v. Rybar

One statute that has received a significant amount of post-*Lopez* attention is 18 U.S.C. § 922(o), which states that "it shall be unlawful for any person to transfer or possess a machine gun" unless one of two exceptions applied.[44] By 1996, when the Third Circuit decided *United States v. Rybar*, several other circuits had already determined that section 922(o) was not a violation the Commerce Clause. There was, however, little consensus with respect to the reasoning employed.[45]

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[40] U.S. CONST. Art. I, § 8, cl. 3.

[41] See *United States v. Lopez*, 514 U.S. 549 (1995).

[42] *Id.*

[43] 18 U.S.C. §922(q)(1)A) (1995).

[44] Exceptions include where the transfer or possession was pursuant to the authority of the "United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof;" or the transfer or possession was of a machine gun lawfully possessed before the date of the section's enactment. *See id.*, at § 922(o)(2)(A)-(B).

[45] See *United States v. Rybar*, 103 F.3d 273, 274 (3d Cir. 1996) (*citing United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996); *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996); *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1995), *cert. denied*, 519 U.S. 819 (1996); *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995); *United States v. Wilks*, 58 F.3d

(continued...)

According to the majority in *Rybar*, several circuits had held that section 922(o) was a regulation of the channels of interstate commerce, therefore, bringing the statute under the first category of commerce power.[46] Moreover, the Seventh Circuit had held section 922(o) constitutional as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[47] Finally, the majority noted that the Tenth Circuit had upheld section 922(o) as a constitutional regulation of the instrumentalities of interstate commerce, thus utilizing the second category for permissible regulation of interstate commerce.[48]

The majority opinion in *Rybar* adds little original analysis to this discussion and did not attempt to resolve the reasoning dispute between the other circuits. Rather, the majority traced the legislative history of federal firearms statutes and concluded that by the time Congress enacted section 922(o), "it had already passed three firearm statutes under its commerce power based on its explicit connection of the interstate flow of firearms to the increasing serious violent crime in this country, which Congress saw as creating a problem of 'national concern.'"[49] Specifically, with respect to section 922(o), the majority relied on supporting language in committee reports as well as floor statements during consideration of the legislation.[50] With respect to the constitutional analysis, the majority simply recounted the various methods employed by their sister circuits and concluded that section 922(o) was constitutional as a valid exercise of Congress's power under the Commerce Clause.[51]

Judge Alito's dissent, however, started by asking whether *Lopez* was a "constitutional freak," or whether it represented recognition that the Constitution still provides meaningful limits on congressional power.[52] In short, Judge Alito concluded that the statute could be saved in one of two ways. If Congress had

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[45] (...continued)
1518 (10th Cir. 1995); *United States v. Pearson*, 8 F.3d 631 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994)).

[46] See e.g., *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996); *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1995), *cert. denied*, 519 U.S. 819 (1996); *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995).

[47] See *Kenney*, 91 F.3d at 890 (*quoting Lopez*, 514 U.S. at 560).

[48] See *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995).

[49] *See Rybar*, 103 F.3d at 281.

[50] *See id.*, at 281 (citing H.R. Rep. No. 495, 99th Cong., 2d sess., 2, 7 (1986) (describing proposed machine gun restrictions as "benefits for law enforcement" and citing "the need for more effective protection of law enforcement officers from the proliferation of machine guns"); see also *id.*, at 4, (depicting machine guns as "used by racketeers and drug traffickers for intimidation, murder and protection of drugs and the proceeds of crime"); 132 *Cong. Rec.* 9,602 (1986) (statement of Sen. Kennedy) ("The only thing that has changed about the machine gun situation since the 1968 act ... is that machine guns have become a far more serious law enforcement problem.").

[51] *See id.*, at 284-85.

[52] *See id.*, at 286 (Alito, J. dissenting).

provided the necessary jurisdictional element, thereby limiting the statute to purely interstate activity, or if "Congress made findings that the purely intrastate possession of machine guns has a substantial effect on interstate commerce...."[53] Since, in Judge Alito's opinion, neither of these two requirements was satisfied, the statute, as written, should have been held unconstitutional.

Given that the majority opted not to assert a unique rationale for its conclusion, Judge Alito's dissent refuted all three established grounds for holding Section 922(o) constitutional. First, he challenged the position of the Fifth, Sixth, and Ninth Circuits that the statute is a regulation of the channels of interstate commerce. According to Judge Alito, those circuits reasoned that under Section 922(o) there could be no unlawful possession without an unlawful transfer, because the statute exempted lawful possessions prior to its enactment. Further, the circuits argued that the restriction was a necessary and proper way to assist law enforcement in tracking and detecting illegal machine gun transfers.[54] In Judge Alito's opinion, this reasoning was flawed for three reasons: First, it relied on faulty facts, namely, that every unlawful possession is the result of an unlawful transfer. In fact, as Judge Alito posited, an unlawful possession could result from the conversion of a lawful weapon, or from the expiration of the requisite government authority that made possession lawful;[55] second, the rationale "seems to confuse an unlawful transfer with an interstate transfer"[56]; and finally, the circuits' reliance on the ability of Congress to suppress an interstate market by regulating intrastate behavior is an argument in support of the substantial effects test, not the channels of interstate commerce.[57]

Next, Judge Alito's dissent challenged the assertion by the Sixth and Tenth Circuits that Section 922(o) can be justified as a regulation of activities that threaten the instrumentalities of interstate commerce. Judge Alito argued that this would be true, if, say, Congress enacted the statute to prevent machine guns from being used to "damage vehicles traveling interstate, to carry out robberies of goods moving in interstate commerce, or to threaten or harm interstate travelers."[58] Congress, however, made no such findings, and the reasoning of the Sixth and Tenth Circuits

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[53] *Id.*, at 287 (Alito, J. dissenting).

[54] *See id.*, at 289 (Alito, J. dissenting) (*citing Kirk*, 70 F.3d at 796; *Beuckelaere*, 91 F.3d at 783; *Rambo*, 74 F.3d at 951-52).

[55] *See id.*, at 289 (Alito, J. dissenting) (stating that "it is not true that every possession criminalized by 18 U.S.C. § 922(o) must be preceded by an unlawful transfer).

[56] *Id.*

[57] *Id.* (Stating that "insofar as the Fifth, Sixth, and Ninth Circuits justified 18 U.S.C § 922(o) as an attempt to suppress an interstate market by banning purely intrastate possession, their arguments fall within the third *Lopez* category, i.e., Congress's authority to regulate an intrastate activity (intrastate possession) that has a substantial effect on interstate commerce (the interstate market).").

[58] *Id.*, at 290 (Alito, J. dissenting).

was described by Judge Alito as "elusive" and, in his opinion, better suited to arguing for constitutionality under the substantial effects prong of the Commerce Clause.[59]

Finally, Judge Alito undertook an analysis of the statute under the "substantial effects" prong of the Court's Commerce Clause jurisprudence. Judge Alito's theory was that

> to bring this case within the third *Lopez* category, it is not enough to observe that violent criminals, racketeers, and drug traffickers occasionally use machine guns in committing their crimes and that these crimes have interstate effects. Rather, there must be a reasonable basis for concluding that the regulated activity (the purely intrastate possession of machine guns) facilitates the commission of these crimes to such a degree as to have a substantial effect on interstate commerce.[60]

While not dismissing this theory as irrational, Judge Alito rejected the majority's reasoning for lack of empirical proof of its validity. In other words, according to Judge Alito, there was no substantial evidence that Congress rationally concluded that which was necessary to sustain the statute under the substantial effects prong. For Judge Alito it appeared that neither the combing of the legislative history of federal firearms law, nor the majority's reliance on the committee reports and floor statements was sufficient to establish that Congress believed that "the purely intrastate possession of machine guns, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce."[61] In sum, Judge Alito concluded by stating that out of respect for the principles of federalism, "we should require at least some empirical support before we sustain a novel law that effects 'a significant change in the sensitive relation between federal and state criminal jurisdiction.'"[62]

Gonzales v. Raich

A recent opinion by the Supreme Court subsequent to Judge Alito's dissent in *Rybar* puts much of his reasoning in doubt. In *Gonzales v. Raich*, the United States Supreme Court granted *certiorari* specifically on the question of whether the power vested in Congress by both the "Necessary and Proper Clause," and the "Commerce Clause" of Article I includes the power to prohibit the local growth, possession, and

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[59] *Id.*, (Alito, J. dissenting) (citing *Beuckelaere*, 91 F.3d at 784 (stating that "[m]achineguns travel in interstate commerce, posing a threat to local law enforcement, which has a disruptive effect on interstate commerce."); *see also Wilks*, 58 F.3d at 1521 (arguing that "machine guns ... by their nature are a commodity ... transferred across state lines for profit by business entities.")).

[60] *Id.*, at 292 (Alito, J. dissenting).

[61] *Id.*, at 294 (Alito, J. dissenting).

[62] *Id.* (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). It is important to note that in 2003 a panel of judges on the Ninth Circuit Court of Appeals concluded that section 922(o) violated the Commerce Clause primarily on the grounds that it lacked a jurisdictional element limiting its application to only interstate cases as required by the Supreme Court's decisions in *Lopez*, and *United States v. Morrison*, 529 U.S. 598 (2000). *See United States v. Stewart*, 348 F.3d 1132,1133 (9th Cir. 2003).

use of marijuana permissible as a result of California's law.[63] Justice Stevens, writing for the majority, reversed the Ninth Circuit's decision and held that Congress's power to regulate commerce extends to purely local activities that are "part of an economic class of activities that have a substantial effect on interstate commerce."[64]

In reaching its conclusions, the Court relied heavily on its 1942 decision in *Wickard v. Filburn*, which held that the Agricultural Adjustment Act's federal quota system applied to bushels of wheat that were homegrown and personally consumed. *Wickard* stands for the proposition that Congress can rationally combine the effects that individual producers have on a commercial market to find substantial impacts on interstate commerce.[65] The Court pointed to numerous similarities between the facts presented in *Raich* and those in *Wickard*. Initially, the Court noted that because the commodities being cultivated in both cases are fungible and that well-established interstate markets exist, both markets are susceptible to fluctuations in supply and demand based on production intended for home-consumption being introduced into the national market.[66]

According to the Court, just as there was no difference between the wheat Mr. Wickard produced for personal consumption and the wheat cultivated for sale on the open market, there is no discernable difference between personal home-grown medicinal marijuana and marijuana grown for the express purpose of being sold in the interstate market.[67] Thus, the Court concluded that Congress had a rational basis for concluding that "leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."[68]

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[63] *Gonzales v. Raich*, ___ U.S. ___, 125 S. Ct. 2195 (2005).

[64] *Id.*, at 2205 (citing *Perez v. United States*, 402 U.S. 146, 151 (1970)). The final outcome was 6-3 with Justice Stevens writing for himself and Justices Souter, Kennedy, Breyer, and Ginsburg. Justice Scalia, in a separate opinion, concurred only in the Court's judgment. *See id.*, at 2215. Justice O'Connor dissented and filed an opinion that both Chief Justice Rehnquist and Justice Thomas joined in part. *See id.*, at 2221. In addition, Justice Thomas filed his own dissenting opinion. *See id.*, at 2229.

[65] *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that, economic activity, regardless of its nature, can be regulated by Congress if the activity "asserts a substantial impact on interstate commerce ...").

[66] *Raich*, 125 S.Ct. at 2207, n. 29. The Court noted that the while the marijuana market is an illegal or illicit market, this fact appears to be of no legal or constitutional significance as Congress's power arguably encompasses both lawful and unlawful interstate markets. *See id.* (citing *Lopez*, 514 U.S. at 571, (Kennedy, J., concurring) (stating that "[i]n the *Lottery Case*, 188 U.S. 321 (1903), the Court rejected the argument that Congress lacked [the] power to prohibit the interstate movement of lottery tickets because it had power only to regulate, not to prohibit.").

[67] *Raich*, 125 S.Ct. at 2207.

[68] *Id.*, (stating that "we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana

(continued...)

Despite having concluded that under the "rational basis test" Congress had acted within its constitutional authority when it enacted the Controlled Substances Act and applied it to intrastate possession of marijuana, the Court nevertheless had to distinguish *Lopez* and *Morrison*, the Court's more recent Commerce Clause decisions. The Court concluded that the Controlled Substances Act, unlike the statutes in either *Lopez* (Gun Free School Zones Act) or *Morrison* (Violence Against Women Act), regulated activity that is "quintessentially economic"; therefore, neither *Lopez* or *Morrison* cast any doubts on the constitutionality of the statute.[69] The Court specifically rejected the reasoning used by the Ninth Circuit, concluding that "Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court of Appeals was an essential part of the larger regulatory scheme."[70]

In supporting its conclusions, the Court noted that, by characterizing marijuana as a "Schedule I" narcotic, Congress was implicitly finding that it had no medicinal value at all. In addition, the Court returned to the fact that medicinal marijuana was a fungible good, thus making it indistinguishable from the recreational versions that Congress had clearly intended to regulate. According to the Court, to carve out medicinal use as a distinct class of activity, as the Ninth Circuit had done, would effectively make "*any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the 'outer limits' of Congress'[s] Commerce Clause authority."[71] Moreover, the Court held that California's state law permitting the use of marijuana for medicinal purposes cannot be the basis for placing the respondent's class of activity beyond the reach of the federal government, due to the Supremacy Clause, which requires that, in the event of a conflict between state and federal law, the federal law shall prevail.[72]

Finally, the Court responded to the respondent's argument that its activities are not an "essential part of a larger regulatory scheme" because they are both isolated and policed by the State of California and they are completely separate and distinct from the interstate market.[73] The Court held that not only could Congress have rationally rejected this argument, but also that it "seem[ed] obvious" that doctors, patients, and caregivers will increase the supply and demand for the substance on the

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[68] (...continued)
outside federal control would similarly affect price and market conditions.") (internal citations omitted).

[69] *Id.*, at 2209-10

[70] *Id.*, at 2211.

[71] *Id.*, at 2212 (emphasis in original).

[72] *Id.*

[73] *Id.*, at 2213.

open market.[74] In sum, the Court concluded that the case for exemption can be distilled down to an argument that a locally grown product used domestically is immune from federal regulation, which has already been precluded by the Court's decision in *Wickard v. Filburn*.[75]

Conclusion

It is difficult to conclude from Judge Alito's opinion in the *Chittister* case whether or not the Judge has a more restrictive view of the 11th and 14th Amendment than a majority of Justices on the Supreme Court. In general, it appears that Judge Alito's opinion in the *Chittister* case was consistent with Supreme Court precedent at the time. Although Judge Alito has been criticized because his opinion did not anticipate the result in the subsequent case of *Nevada Department of Human Resources v Hibbs*, the *Hibbs* case actually addressed a separate provision of the FMLA. The *Chittister* case is arguably distinguishable from the *Hibbs* case, a conclusion which has been reached by other federal circuits.

Judge Alito's dissent in the *Rybar* case, however, seems to have anticipated a more expansive application of the *Lopez* and *Morrison* decisions than was adopted by most other circuits at the time. Further, his reasoning in *Rybar* may have been largely repudiated in the subsequent Supreme Court case of *Gonzales v. Raich*. Consequently, it would appear that Judge Alito's dissent was an argument for a more limited interpretation of the Commerce Clause than is consistent with current case law

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[74] *Id.*, 2213-14 (stating that "[i]ndeed that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just 'plausible' as the principal dissent concedes, ... it is readily apparent").

[75] *Id.*, at 2215.